

THE HONORABLE JOHN H. CHUN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

FEDERAL TRADE COMMISSION, et al.,

Plaintiffs,

v.

AMAZON.COM, INC., a corporation,

Defendant.

Case No. 2:23-cv-01495-JHC

**AMAZON’S SUPPLEMENTAL BRIEF  
CONCERNING DEPOSITION LIMITS**

In the Joint Status Report (“JSR”), Plaintiffs proposed to take 630 hours of testimony (the equivalent of 90 7-hour depositions) of Amazon witnesses. Dkt. #135 (“JSR”) at 27. Although that 90-deposition proposal lacked foundation in any demonstrable need—particularly given the sweeping investigation already conducted by the FTC—Plaintiffs declined to discuss any more reasonable limit that would work within the case schedule and not inflict excessive burden. Amazon therefore respectfully asks this Court to impose a reasonable limit of no more than 30 party depositions per side, to be exceeded only with Court permission based on demonstrated need, along with the 50 third-party depositions per side discussed below. For benchmarking purposes, 30 depositions is almost double the number of Amazon witnesses identified in Amazon’s initial disclosures. Amazon’s overall proposal is tailored to the Court’s schedule, and to the discovery Plaintiffs themselves found adequate in a longer and wider-ranging investigation. Specifically, in

1 the four years preceding this lawsuit, the FTC and certain Plaintiff States conducted broad and  
 2 intensive investigations of Amazon. The FTC took sworn testimony from 29 Amazon witnesses,  
 3 exploring the retail practices now challenged in the Complaint, as well as others ultimately not  
 4 challenged.<sup>1</sup>

5 As for third-party discovery, Amazon agrees at this time to Plaintiffs' proposed limit of 50  
 6 depositions per side, with the caveat that depositions by Amazon of third parties who provided  
 7 discovery to Plaintiffs—whether sitting for investigative depositions, producing documents, or  
 8 providing declarations—should not count against the limit. Plaintiffs had over four years to take  
 9 third-party discovery in their investigations, and Amazon had no visibility into those efforts or any  
 10 right to take discovery of its own. This information disadvantage persists, as Plaintiffs have not  
 11 yet produced their investigative files in response to discovery requests, and Amazon cannot know  
 12 how many third parties were contacted by Plaintiffs or have relevant information. Now that  
 13 Plaintiffs have filed suit and will turn over their investigative files, Amazon should be permitted  
 14 to catch up by taking discovery from the yet unknown third-party participants in Plaintiffs'  
 15 investigations without prejudice to its ability to obtain discovery from others.

16 Amazon's proposal for 30 party and 50 third-party fact witness depositions is substantially  
 17 beyond the presumptive limits set by Federal Rule 30.<sup>2</sup> It is reasonable in light of the extensive  
 18 record already available to Plaintiffs and consistent with the scope of deposition discovery in  
 19 comparable antitrust cases. The overall limit Amazon proposes, as opposed to Plaintiffs' proposal  
 20 for 50 third-party depositions per side and 90 depositions of Amazon witnesses, is tailored to the  
 21 Court's August 2025 fact discovery cutoff. Moreover, this number is commensurate with  
 22  
 23

24 <sup>1</sup> Before Plaintiffs' own expansive investigation, they had the benefit of attending (and were invited to question at)  
 25 investigational depositions of Amazon witnesses conducted by the California Attorney General's office into many of  
 the same Amazon business practices.

26 <sup>2</sup> Amazon understands that party depositions include current and former employees, directors, and corporate  
 representatives, and that expert depositions would not be counted against these limits.

comparable cases, which are, in aggregate, more restrictive than Amazon’s proposal. Amazon asks that the Court adopt this proposal.

First, Amazon’s proposal reflects the discovery needs of the case, as evidenced by the conduct of Plaintiffs themselves. As noted, during their pre-filing investigations into Amazon, Plaintiffs took virtually unbounded discovery. That sweeping discovery included taking sworn testimony from 29 Amazon witnesses. Feb. 15, 2024 Decl. of Kevin M. Hodges (“Hodges Decl.”) ¶ 4. Plaintiffs questioned the witnesses—including multiple executives at Amazon’s most senior leadership level—in detail about the pricing and fulfillment policies now challenged in the Complaint. Before these investigational depositions, Plaintiffs had attended (and had the opportunity to conduct questioning during) investigative depositions of Amazon witnesses conducted by the California Attorney General’s office in its overlapping investigation. *Id.* ¶ 5. Those California pre-suit depositions covered topics that are also alleged here, *California v. Amazon*, No. CGC-22-601826 (Cal. Superior Court, San Francisco County) (the “California Action”).<sup>3</sup> Hodges Decl. ¶ 4. Plaintiffs, having the benefit of sitting through that extensive testimony and having received more than a million of Amazon documents, then took sworn testimony of many of these same witnesses in their investigation, as well as many others. *Id.* ¶¶ 3, 6.

Plaintiffs suggest that this investigative testimony is somehow irrelevant to the scope of discovery that should be permitted in this case. JSR at 29-30. But that testimony involved the same business practices challenged in the Complaint, which cites directly to investigational testimony. *See, e.g.*, Compl. ¶¶ 137-138. Plaintiffs took this testimony after Amazon had produced millions of pages of documents and 130 pages of narrative responses in connection with extensive information requests. Hodges Decl. ¶ 6. Plaintiffs’ suggestion is also belied by their own JSR submission; they exempt investigative testimony from the applicable deposition limit,

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<sup>3</sup> Plaintiffs have also requested in discovery all of the deposition transcripts from the California Action.

1 showing their intent to try to rely on that testimony in addition to the 90 depositions that they  
2 request. JSR at 26-27.

3 To support their view that the Court should not consider investigative discovery in  
4 establishing discovery limits, Plaintiffs identify only one case, *SEC v. Sargent*, 229 F.3d 68 (1st  
5 Cir. 2000), that dealt with the interplay between an agency's investigative and litigation  
6 discovery.<sup>4</sup> See JSR at 34. But that case suggested only that the agency could not be required to  
7 rely *exclusively* on its pre-suit investigation, with no further civil discovery. *Id.* at 74, 80. No one  
8 is urging such a position here—Amazon proposes 30 depositions of party witnesses, allowing  
9 Plaintiffs to build upon the vast discovery they already possess.

10 Second, Amazon's proposed deposition limits are consistent with limits in other large  
11 antitrust cases, including those cited by Plaintiffs. In the *Google* antitrust litigation, for instance,  
12 the court's initial order adopted the parties' agreement to limit total depositions to 65 per side,  
13 similar to Amazon's proposal here.<sup>5</sup> *United States v. Google*, No. 20-cv-03010 (D.D.C.), Dkt. #85,  
14 ¶ 14. And in *FTC v. Qualcomm*, Rule 30's presumptive limit applied until the parties agreed to  
15 allow "all parties to conduct in excess of ten (10) depositions per side." No. 17-cv-0220 (N.D.  
16 Cal.), Dkt. #207 (Sept. 22, 2017); see also *id.* Dkt. #75 (Apr. 19, 2017). Other antitrust cases by  
17 government enforcers, not cited by Plaintiffs, set deposition limits in line with Amazon's proposal.  
18 See *FTC v. Actavis*, No. 09-cv-955 (N.D. Ga. June 11, 2014), Dkt. # 307, §§ II, III (40 total  
19 depositions per side in consolidated antitrust actions by FTC and private plaintiffs); *United States*  
20 *v. Microsoft*, No. 98-cv-1232 (D.D.C. Sept. 28, 2001), Dkt. # 635, § 5(g)-(h) (30 total depositions  
21 per side); *FTC v. Ovation Pharms., Inc.*, No. 08-cv-6379 (D. Minn. Jan. 15, 2009), Dkt. #20 at 14  
22 (15 total depositions per side).

23  
24 <sup>4</sup> Plaintiffs also cite in the JSR other cases that address intricacies of agency discovery but not the appropriate scope  
of deposition discovery. JSR at 34.

25 <sup>5</sup> The Court later allowed an increase of 15 depositions per side following consolidation with other plaintiffs who  
26 sought additional discovery on different theories. No. 20-cv-03010 (D.D.C.), Dkt. #108. That increase was fewer  
than the 30 additional depositions per side that those plaintiffs had requested and resulted in an overall limit of 80  
depositions. *Id.* Dkt. #105.

1 Plaintiffs rely on one case, *FTC v. Meta Platforms*, No. 20-cv-03590 (D.D.C. Mar. 3,  
 2 2022), which set an 840-hour (equivalent of 120 7-hour depositions) limit for fact deposition  
 3 testimony. Dkt. #103, ¶ 14(a). But the circumstances there were different in two key respects:  
 4 first, the parties in *Meta* agreed to and jointly proposed that deposition limit. *See id.* Dkt. #102.  
 5 Second, the limit applied equally to both sides and did not distinguish between “party” depositions  
 6 and third-party depositions. *Id.* Dkt. #103. In contrast, Plaintiffs’ proposal is neither based on  
 7 agreement of the parties nor supported by the showing required by the Federal Rules. Courts in  
 8 this Circuit deviate from Rule 30’s presumptive limit only upon “a ‘particularized showing’ of the  
 9 need for additional depositions.” *Jordan v. Wonderful Citrus Packing LLC*, 2019 WL 176264, at  
 10 \*2 (E.D. Cal. Jan. 11, 2019) (quoting *Thykkuttathil v. Keese*, 294 F.R.D. 597, 599 (W.D. Wash.  
 11 2013)). A “particularized showing” requires a party to demonstrate specifically why it needs the  
 12 additional depositions it seeks. *Kaseberg v. Conaco, LLC*, 2016 WL 8729927, at \*3-4 (S.D. Cal.  
 13 Aug. 19, 2016). As Rule 30 makes clear, whether and to what extent to increase the deposition  
 14 limit is made in consultation with Rule 26’s relevance, proportionality, and burden considerations.  
 15 *See* Fed. R. Civ. P. 30 advisory committee’s note to 1993 amendment (“One aim of this revision  
 16 is to assure judicial review under the standards stated in Rule 26(b)(2) before any side will be  
 17 allowed to take more than ten depositions in a case without agreement of the other parties.”).

18 Plaintiffs have not made a “particularized showing.” They provided no specific  
 19 justification for their proposal in the JSR and never engaged in negotiations toward reaching  
 20 agreement on the number of depositions. Rather, they have made only generalized assertions about  
 21 the “multiple arms of Amazon’s operations” allegedly at issue and the self-described  
 22 “significan[ce]” of their “antitrust enforcement action.” JSR at 27, 30. Such general arguments  
 23 do not justify an unusually large number of depositions, and their number is unsupported by  
 24 comparable antitrust cases. Amazon’s proposal of 30 party and 50 non-party depositions reflects  
 25 a substantial, yet proportional, increase to the Rule 30 deposition limits: Plaintiffs will have ample  
 26 opportunity to question Amazon witnesses on issues relevant to the case. And both sides will be

1 able to obtain third-party discovery needed to determine questions of relevant market, market  
2 power, and anticompetitive effects.

3 Third, Plaintiffs' proposal would impose unjustifiable burdens on Amazon's current  
4 and former employees. Amazon's witnesses were deposed multiple times in Plaintiffs' and  
5 California's investigations. Certain of these individuals may be required to give testimony again  
6 here, but a 90-deposition limit imposes no guardrails against cumulative and unnecessary  
7 questioning on topics comprehensively covered in prior testimony. Plaintiffs' proposal would also  
8 be highly disruptive to Amazon's business; 90 depositions equate to one deposition every workday  
9 for 4.5 months. Such burdensome discovery is neither necessary nor proportional to the needs of  
10 the case given the extensive pre-suit testimony.<sup>6</sup>

11 Finally, Plaintiffs' proposal is inconsistent with the pretrial schedule. Under the Case  
12 Scheduling Order, Plaintiffs' proposed 190 depositions—assuming, as Plaintiffs do, that Amazon  
13 takes no depositions of Plaintiffs—must be completed by August 8, 2025. Dkt. #159. Based on  
14 Amazon's experience in the California Action, it is ambitious to expect that so many depositions  
15 could be conducted in this timeframe. That Action was filed in September 2022—a year before  
16 this case—and discovery has proceeded more slowly than contemplated by Plaintiffs. Third-party  
17 discovery, in particular, has required significant negotiation concerning the scope of document  
18 production and deposition scheduling, and thus far only seven deposition have gone forward.  
19 Hodges Decl. ¶ 7. It is unrealistic to insist, as Plaintiffs do, that a far greater number of depositions  
20 should occur in a more compressed period.

21 Amazon's proposal of 30 party and 50 third-party depositions calibrates the needs of  
22 discovery to all parties' interest in efficiency. Setting reasonable limits on party depositions  
23 ensures that each side will focus its discovery efforts on essential facts and avoid cumulative

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24 <sup>6</sup> Notably, Plaintiff's proposal is wholly one-sided. In the JSR, Plaintiffs took the position that no depositions of their  
25 party-affiliated witnesses would ever be warranted. JSR at 30. Plaintiffs have not yet produced their investigative  
26 files, however, so it is premature to know what testimony will be needed (for example, facts concerning interactions  
with third parties that bear on witness credibility). But whether Plaintiffs' party witnesses should be deposed need  
not be decided now; Amazon simply asks that the number of party depositions apply equally to both sides.

depositions that are duplicative of each other and pre-suit testimony. Amazon's proposal allows Plaintiffs to take discovery in excess of the Rules' default limits and commensurate with the needs of the case, but without causing undue burden or duplication.

#### CONCLUSION

For the reasons above, Amazon respectfully requests that the Court limit each side to up to 30 party and 50 third-party fact witness depositions, excluding depositions taken by Amazon of third-party participants in Plaintiffs' pre-suit investigations.

DATED this 16th day of February, 2024.

*I certify that this memorandum contains 2,040 words, in compliance with Dkt. 151.*

#### **MORGAN, LEWIS & BOCKIUS LLP**

By: s/ Patty A. Eakes  
 Patty A. Eakes, WSBA #18888  
 Molly A. Terwilliger, WSBA #28449  
 1301 Second Avenue, Suite 3000  
 Seattle, WA 98101  
 Phone: (206) 274-6400  
 Email: [patty.eakes@morganlewis.com](mailto:patty.eakes@morganlewis.com)  
[molly.terwilliger@morganlewis.com](mailto:molly.terwilliger@morganlewis.com)

#### **WILLIAMS & CONNOLLY LLP**

By: s/ Kevin M. Hodges  
 Heidi K. Hubbard (*pro hac vice*)  
 John E. Schmidtlein (*pro hac vice*)  
 Kevin M. Hodges (*pro hac vice*)  
 Jonathan B. Pitt (*pro hac vice*)  
 Carl R. Metz (*pro hac vice*)  
 Carol J. Pruski (*pro hac vice*)  
 Constance T. Forkner (*pro hac vice*)  
 680 Maine Avenue SW  
 Washington, DC 20024  
 Phone: (202) 434-5000  
 Email: [hhubbard@wc.com](mailto:hhubbard@wc.com)  
[jschmidtlein@wc.com](mailto:jschmidtlein@wc.com)  
[khodges@wc.com](mailto:khodges@wc.com)  
[jpitt@wc.com](mailto:jpitt@wc.com)  
[cmetz@wc.com](mailto:cmetz@wc.com)  
[cpruski@wc.com](mailto:cpruski@wc.com)

[cforkner@wc.com](mailto:cforkner@wc.com)

**COVINGTON & BURLING LLP**

Thomas O. Barnett (*pro hac vice*)

One CityCenter

850 Tenth Street, NW

Washington, DC 20001-4956

Phone: (202) 662-5407

Email: [tbarnett@cov.com](mailto:tbarnett@cov.com)

*Attorneys for Defendant Amazon.com, Inc.*